IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 247 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VADIA @ VADILAL
Versus
STATE OF GUJ

Appearance:
MR MR VYAS for Appellants No. 1-2
THROUGH JAIL for Appellants No. 1-2
MR HL JANI, APP for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 15/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The present appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Surat in Sessions Case No.40 of 1993 on January 31st, 1994 convicting the appellants for offence punishable under Section 302 read with Section 114 of the I.P.C. and sentencing them to undergo imprisonment for life and to pay a fine of Rs.100/- each and, in default in payment of fine, to undergo S.I. for 7 days.

2. The facts of the case in brief are that the present appellant Vadia @ Vadilal Thogia Gamit and accused no.2 Ramesh @ Ruvadio Reva Gamit were staying in the industrial shed of Vinus Chemicals at Plot No.C-1/B/309/2 in the GIDC Industrial Estate at Pandesara, Surat. On 26th September, 1992, at about 12.00 in the midnight, while they were in the shed, one Jugal Kishore was also in their company. The said Jugal Kishore held hand of Varsha, wife of appellant no.1 which annoyed both the appellants, as a result of which appellant no.1 gave a hammer blow in the chest of Jugal Kishore and appellant no.2 inflicted blows on the head of Jugal Kishore with an iron rod. As a result of this assault, Jugal Kishore died. As per the prosecution case, this incident was witnessed by Kantubhai Damjibhai (Exh.26) and Shivbahadur Babusingh (Exh.25). A complaint came to be lodged with the police on the next day by Omprakashsingh Shyamnarayansingh Thakore, on the basis of which an offence was registered vide Sachin Police Station C.R. No.I/177/92. On investigation, it was found that there was sufficient evidence to connect the present appellants with the offence and, therefore, a report under Section 173 of Cr.P.C. was filed by the police in the Court of JMFC, Surat. The learned JMFC, after following the procedure, committed the case to the Court of Sessions as the offences were triable exclusively by the Court of Sessions and Sessions Case No.40/93 came to be registered by the Sessions Court.

3. The charge against the appellants was framed at Exh.2 to which both of them pleaded not guilty and claimed to be tried.

4. The learned Additional Sessions Judge, after considering the evidence led by the prosecution, found that the charges were successfully proved by the prosecution against the appellants and, therefore, convicted them for the offence of murder of Jugal Kishore and sentenced them, as stated above.

5. Aggrieved by the said judgment and order, the

present appeal is preferred by the convicts.

6. Learned advocate Mr. M.R. Vyas appearing for the appellants submitted that the prosecution case has wrongly been accepted by the Trial Court. According to Mr. Vyas, the evidence of Kantubhai and Shivbahadur should not have been accepted. So far as Shivbahadur is concerned, he has admitted in his cross-examination that the shutter was open only by 4 feet and that he was not able to see the faces of the persons sitting inside. Assailing the deposition of Kantubhai, Mr. Vyas submitted that the conduct of this witness is unnatural. His version gets no corroboration from other evidence. His statement that there was a wooden door, that there was a heap of Kabchi finds no place in the panchnama. Mr. Vyas submitted that the medical evidence also does not support the version of this witness about appellant no.1 having given hammer blow in the chest because, according to the doctor, the injury on the eyebrow was possible with a hammer and that the injury in the chest was not possible with a hammer. Mr. Vyas submitted that under these circumstances, when the case hangs only on the deposition of such eye-witnesses, the evidence could not have been accepted and conviction ought not to have been recorded. Mr. Vyas, therefore, urged that the conviction may be set aside and the appeal may be allowed.

6.1 By way of an alternative submission, Mr. Vyas submitted that even if the prosecution case is accepted at face value, the deceased had misbehaved with the wife of appellant no.1. Obviously, the appellant got provoked and caused the injury. There could not have been any intention to cause murder and, therefore, the case may be considered as one punishable under Section 304 Part II of the I.P.C.

7. The appeal is opposed to by learned Additional PP Mr. Jani. According to Mr. Jani, the conviction is rightly recorded and this court may not interfere.

8. Having regard to the contentions raised before us, we have closely perused the record and proceedings and the evidence on record.

9. As rightly stated by Mr. Vyas, the prosecution case is mainly founded on the depositions of Shivbahadur Babusingh and Kantubhai Damjibhai who claimed to have seen the incident.

10. Shivbahadur Babusingh (Exh.25) says that he saw

the appellants inflicting injuries on deceased Jugal Kishore. In cross-examination, this witness has admitted that because the shutter was open by 4 feet only, he was not in a position to see the faces of the persons sitting inside. All that he could see was that there was one lady, two other persons and Jugal. Thus, from the deposition of this witness, the appellants cannot be connected with the crime.

11. So far as deposition of Kantubhai Damjibhai (Exh.26) is concerned, he says that he was there in the shed when the incident occurred. He says that he had talked to appellant no.1 as to what were the relations of his wife Varsha with deceased Jugal and the appellant no.1 said that it was none of his business. The witness then proceeds to say that at the time of the incident, he saw that the deceased Jugal held hand of Varsha. Therefore, appellant no.1 said that why is he doing so and then the incident occurred wherein both the appellants caused injury to the deceased. The witness categorically states that the incident occurred only because Jugal held the hand of Varshaben. It would be appropriate to note at this stage that Varshaben, in her version, does not support the incident but deposition of this witness cannot be disbelieved only on that count.

12. Varshaben is examined at Exh.36 as a court witness and her examination-in-chief is recorded in question-answer form. In her deposition, she says that alongwith her and her husband as well as appellant no.2, Kantu was staying in the shed. The incident has occurred at midnight and, therefore, presence of Kantu at the place of incident is natural and as such, there is no reason to disbelieve the say of Kantu. He has been cross-examined at length but nothing material comes out to render his deposition unbelievable.

13. In our opinion, considering the circumstances in which the incident has occurred and considering the evidence on record, it appears that deceased Jugal held the hand of Varsha, wife of appellant no.1. Something had transpired between Kantu and appellant no.1 regarding relation of Varsha and Jugal and this resulted into the incident. It also appears that appellant no.1 is alleged to have inflicted only one blow with a hammer. The appellant no.2 has given blows with an iron rod. Both these weapons are implements used in construction work and must have been lying there. Till Jugal held hand of Varsha, nothing had happened and, therefore, the incident appears to have occurred in the spur of the moment and in the heat of passion, the injuries are caused. The case,

therefore, can be considered as one falling under Section 304 of the I.P.C. as it is difficult to infer an intention of causing death of the deceased, considering the circumstances in which the incident has occurred. We, therefore, feel that the appeal deserves to be allowed partly. The conviction deserves to be altered as one under Section 304 Part I read with Section 114 of the I.P.C. instead of Section 302 read with Section 114 of the I.P.C.

14. We have heard the learned advocates on the aspect of quantum of sentence. Mr. Vyas has urged that the appellants are in prison for nearly 10 years and, therefore, minimum punishment may be imposed.

15. In the facts and circumstances of the case, in our view, the ends of justice would be met if the appellants are sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.100/-, in default, to undergo Simple Imprisonment for a period of 7 days. The appeal, therefore, is allowed in part accordingly.

(M.C. Patel, J.)

(A.L. Dave, J.)

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